

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

THE RELIGIOUS SISTERS OF MERCY,
et al.,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the
United States Department of Health
and Human Services, *et al.*,

Defendants.

No. 3:16-cv-386

CATHOLIC BENEFITS ASSOCIATION,
et al.,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the
United States Department of Health
and Human Services, *et al.*,

Defendants.

No. 3:16-cv-432

STATUS REPORT

In response to this Court's August 24, 2017 Order, ECF No. 56, Defendants hereby provide the following update "concerning all rulemaking proceedings initiated as to the challenged rule as well as any contemplated enforcement actions." ECF No. 56 at 3.¹ *See also*

¹ Pursuant to Fed. R. Civ.P. 25(d), Alex M. Azar II is substituted as a defendant in his official capacity as Secretary of Health and Human Services.

45 C.F.R. § 92 (the “Rule”). As previously described, Defendants are reevaluating the reasonableness, necessity, and efficacy of the Rule that is challenged in this case and, as part of that process, are assessing the issues identified by the District Court for the Northern District of Texas in *Franciscan Alliance, Inc. v. Burwell*, Case No. 7:16-cv-108 (“*Franciscan Alliance*”), when it granted a nationwide preliminary injunction that enjoins the same Rule that is challenged here. *Id.*, Docket No. 105 (July 10, 2017).

A draft of a proposed rule is going through the clearance process within the Executive Branch. Specifically, Defendants have engaged with the Department of Justice (“DOJ”) on a draft of a proposed rule pursuant to Executive Order 12,250 (“Leadership and Coordination of Nondiscrimination Laws”). Since the filing of the last status report, the Executive Order 12,250 process has been completed.

The draft rule must go through an inter-agency clearance process managed by the Office of Management and Budget (“OMB”) under Executive Order 12,866. Defendants anticipate that after the clearance process is complete, the future rulemaking proceedings will involve notice and comment. The time required to complete both the clearance process and notice and comment rulemaking proceedings will depend largely on inter-agency coordination and on the public comments on the proposed rule.

Defendants request an opportunity to continue reconsidering the Rule and do not request that the Court close this case. Meanwhile, Defendants will continue to abide by the nationwide preliminary injunction that was ordered in *Franciscan Alliance*, which remains in full force and effect, and Defendants will therefore not enforce the Rule’s prohibition against discrimination on the basis of gender identity or termination of pregnancy. Thus, HHS is not currently contemplating any enforcement actions pursuant to the Rule. And HHS has not referred or transferred a complaint

that it has received under the Rule to the EEOC, nor has the EEOC received any referrals pursuant to the Rule. Defendants therefore request that the Court maintain the stay in this case.

Dated: February 20, 2018

Respectfully Submitted,

CHAD A. READLER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

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/s/ Emily B. Nestler
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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Emily B. Nestler*
EMILY B.NESTLER